88-1971

No. 88-

JUN 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NICHOLAS NEU,

Petitioner,

vs.

JAMES P. CORCORAN, Individually and as Superintendent of Insurance of the State of New York and JAMES W. RANDOLPH, Individually and as Deputy Superintendent of Insurance of the State of New York,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ANDREW J. GOODMAN
(Counsel of Record)
ROSNER & GOODMAN
342 Madison Avenue
New York, New York 10173
(212) 661-2150

Counsel for Petitioner

Dated: June 1, 1989

QUESTIONS PRESENTED

1. In light of the decision in *Meyer v. Nebraska*, 262 U.S. 390 (1923), that Fourteenth Amendment liberty interests include the right to engage in a "common occupation of life," is the law sufficiently settled so that a State government official should reasonably know that stigmatizing statements which deprive an individual of his chosen occupation violate that individual's due process liberty interests?

2. Does the grant of qualified immunity to a State official on the grounds that the specific challenged action had not previously been determined illegal in a factually identical case conflict with this Court's holding in *Anderson v. Creighton*, 483 U.S. ____, 107 S.Ct. 3034 (1987), that a specific action need not have previously been held unlawful to fall without the protection of qualified immunity?

3. Does an interlocutory appeal from an order denying federal qualified immunity lie under the "collateral order" doctrine where it has been held (and not challenged on appeal) that the State official is not entitled to immunity for state law violations because his conduct was not made during the course of the performance of his duties, and therefore is subject to a trial of the same issues in any event?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner Nicholas Neu and the Respondents James P. Corcoran, individually and as Superintendent of Insurance of the State of New York and James W. Randolph, individually and as Deputy Superintendent of Insurance of the State of New York. There were no additional parties to the proceedings below.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
I. THE SECOND CIRCUIT DECISION GRANTING IMMUNITY IS IN CONFLICT WITH THIS COURT'S DECISIONS ESTABLISHING THE SCOPE OF AVAILABLE IMMUNITY AND WITH OTHER CIRCUIT DECISIONS AS TO THE SCOPE OF PROTECTABLE LIBERTY INTERESTS	8
II. IN FAILING TO DISMISS THE APPEAL, THE SECOND CIRCUIT EXPANDED THE SCOPE OF THE COLLATERAL ORDER DOCTRINE AS APPLIED TO IMMUNITY BEYOND THAT INTENDED BY THIS COURT	15
CONCLUSION	18
APPENDIX	
Opinion of United States District Court for the Southern District of New York	A-1
Opinion of United States Court of Appeals for the Second Circuit	A-11

TABLE OF AUTHORITIES

CASES	Page
Anderson v. Creighton, 483 U.S. ____, 107 S.Ct. 3034 (1987)	9, 12
Baden v. Koch, 799 F.2d 825 (2d Cir. 1986)	11
Board of Regents v. Roth, 408 U.S. 564 (1972)	11, 14
Brandt v. Board of Cooperative Educational Services, 820 F.2d 41 (2d Cir. 1987)	11
Campbell v. Pierce County, 741 F.2d 1342 (11th Cir.), *reh'g denied*, 747 F.2d 710 (1984)	13
Clark v. McGee, 49 N.Y.2d 613 (1980)	16
Colaizzi v. Walker, 542 F.2d 969 (7th Cir. 1976)	10
Conley v. Gibson, 355 U.S. 41 (1957)	4
Cosme v. Town of Islip, 476 N.Y.S.2d 857 (1st Dept.), *aff'd*, 63 N.Y.2d 908 (1984)	16
Economic Development Corp. of Dade County, Inc. v. Stierheim, 782 F.2d 952 (11th Cir. 1986)	13
Emory v. Peeler, 756 F.2d 1547 (11th Cir. 1985)	13
Espanola Way Corp. v. Meyerson, 690 F.2d 827 (11th Cir. 1982), *cert. denied*, 460 U.S. 1034 (1983)	13
Gardiner v. A.H. Robins Co., 747 F.2d 1180 (8th Cir. 1984)	13
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	9, 17

	Page
Havis v. Thornton, 609 F.2d 372 (9th Cir. 1979)	13
Hicks v. Feeney, 770 F.2d 375 (3d Cir. 1985)	9
Huntley v. Community School Board, 543 F.2d 979 (2d Cir. 1976), *cert. denied*, 430 U.S. 929 (1977)	11
Lappe v. Loeffelholz, 815 F.2d 1173 (8th Cir. 1987)	9
Little v. City of North Miami, 805 F.2d 962 (11th Cir. 1986)	13
Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981)	13
Meyer v. Nebraska, 262 U.S. 390 (1923)	3, 10, 14
Mitchell v. Forsyth, 472 U.S. 511 (1985)	4, 6, 9, 15
Monroe v. Pape, 365 U.S. 167 (1961)	10
Moore v. Otero, 557 F.2d 435 (5th Cir. 1977)	10
Paul v. Davis, 424 U.S. 693 (1976)	*passim*
Poirer v. Hodges, 445 F.Supp. 838 (M.D.Fla. 1978)	10
Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438 (2d Cir. 1980)	11, 12
Rudow v. City of New York, 822 F.2d 324 (2d Cir. 1987)	11

	Page
S & D Maintenance Co., Inc. v. Goldin, 844 F.2d 962 (2d Cir. 1988)	11
Stretten v. Wadsworth Veterans Hospital, 537 F.2d 361 (9th Cir. 1976)	10
Sullivan v. Brown, 544 F.2d 279 (6th Cir. 1976)	10
STATUTES AND REGULATIONS	
28 U.S.C. Section 1254(1)	2
Section 1291	3
Section 1292(c)	3
Section 1292(d)	3
Section 1295	3
42 U.S.C. Section 1331	5
Section 1343	5
Section 1983	3, 5
Federal Rules of Civil Procedure Rule 12(b)	2
New York Civil Practice Law and Rules (McKinney 1988)	6

No. 88-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NICHOLAS NEU,

Petitioner,

vs.

JAMES P. CORCORAN, Individually and as Superintendent of Insurance of the State of New York and JAMES W. RANDOLPH, Individually and as Deputy Superintendent of Insurance of the State of New York,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Nicholas Neu respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on March 3, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 869 F.2d 662, and is reprinted in the appendix herewith (A11-24).[1]

The memorandum decision and order for the United States District Court for the Southern District of New York (Sweet, U.S.D.J.) is reported at 695 F.Supp. 1552, and is reprinted in the appendix herewith (A1-10).

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. Section 1983, the Petitioner brought this suit in the Southern District of New York. On September 22, 1988, the Southern District denied in its entirety Respondents' motion to dismiss pursuant to Fed.R.Civ.P. Rule 12(b) for failure to state a claim for which relief may be granted, or, alternatively, for immunity under both federal and state law, and for other interlocutory relief. *See* A1-10.

Respondents appealed insofar as the district court's order denied federal immunity. On appeal, the Second Circuit on March 3, 1989 entered a judgment and an opinion reversing the Southern District's order and directing that Petitioner's complaint be dismissed on the grounds that Respondents are entitled to immunity because prior cases had not clearly established that Respondents' conduct deprived Petitioner of a liberty interest protected by the due process guarantees of the Fourteenth Amendment. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. Section 1254(1).

---

[1] Refers to pages in the Appendix submitted herewith.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. Section 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

This is a civil rights action pursuant to 42 U.S.C. Section 1983 (1982), for deprivation of Petitioner's Fourteenth Amendment liberty interest without due process of law. The liberty interest lost was Petitioner's right to engage in his chosen "common occupation of life." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The deprivation resulted from false statements made by Respondents to insurance regulatory officials at a national convention, falsely accusing in words or substance that, *inter alia*, Petitioner was a swindler, operated a scam, associated with criminals, knowingly violated the law, and did not honor contractual obligations.

The complaint also avers a pendent state law defamation claim.

Background of Dispute

Accepting the complaint as true for the purposes of this petition,[2] Petitioner and Respondents have for many years been engaged in continuing legal battles concerning the jurisdictional reach of the New York Department of Insurance over automobile service businesses of which Petitioner was an officer and director. In the most recent case, involving the American Motor Club, Inc. ("AMC"), the Department of Insurance obtained a judgment which was reversed by the Appellate Division of New York State Supreme Court for violation of Petitioner's procedural due process rights.

During the pendency of the AMC proceedings, Petitioner was terminated as an AMC officer and director, and immediately so advised the New York Attorney General's office. As a consequence, the Attorney General and Respondent Corcoran were able to obtain the appointment of Respondent Randolph as AMC's Receiver, although the court had declined to appoint a receiver while Petitioner was an AMC officer and director. Respondent Randolph immediately took control of AMC.

While Petitioner was an AMC officer and director, AMC honored *bona fide* claims and repaired member vehicles in accordance with its contractual obligations, with a consumer complaint record comparing favorably to industry standards. Commencing after Petitioner's employment terminated, and while Respondent Randolph was AMC's Receiver, AMC ceased repairing vehicles, and abandoned vehicles previously delivered for repair. While Petitioner was an AMC officer and director, AMC's

---

[2] In accordance with *Conley v. Gibson*, 355 U.S. 41 (1957), the district court assumed the truth of the complaint for purposes of determining Respondents' Fed.R.Civ.P. Rule 12(b) motion for failure to state a claim. On appeal, the Second Circuit also presumed true the facts stated in the complaint (A14), since an interlocutory appeal from denial of qualified immunity lies only if solely on the law. *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

assets far exceeded its liabilities but, two months later, after Respondent Randolph's tenure, AMC filed a petition under the United States Bankruptcy laws.

Stigmatization of Petitioner

Having once abused Petitioner's constitutional due process rights in wrongfully obtaining a judgment subsequently vacated, Respondents again violated those rights by a course of conduct intended to, and in fact, ruining Petitioner's reputation and making it likely that he will be unable to earn a living in the automobile repair industry, which was his sole livelihood.

Specifically, in June 1987, at a convention of Insurance Commissioners, Respondents wrongly accused Petitioner of not honoring contractual obligations or repairing vehicles, and of driving AMC into bankruptcy; this notwithstanding that it was during Respondent Randolph's stewardship that AMC abandoned its members and their vehicles, and that AMC was solvent when Petitioner left its employ. Also at the convention, Respondent Randolph, without foundation or merit, labeled Plaintiff a swindler and accused him of operating a scam and associating with criminals. The complaint additionally alleges communication of these allegations to other Insurance Departments throughout the country.

As a consequence of Respondents' statements, the California Department of Insurance successfully undertook, and continues, action to force Petitioner out of the automobile service businesses he had started in California after leaving AMC.

The Proceedings Below

This action followed, alleging two claims – one pursuant to 42 U.S.C. Section 1983 for depriving Plaintiff without due process of law of his liberty interest in his good name and reputation thus foreclosing a range of professional opportunities, and the other for state law defamation.

Subject matter jurisdiction is predicated on federal question grounds pursuant to 42 U.S.C. Sections 1331 and 1343, and pendent jurisdiction.

By April 14, 1988 Notice of Motion and supporting affidavit, Respondents moved pursuant to Fed.R.Civ.P. Rule 12(b) to dismiss the complaint for failure to state a claim on which relief can be granted. As to the civil rights count, Respondents argued that the complaint failed to state a claim because their conduct did not deprive Petitioner of a constitutionally protected interest, and alternatively sought qualified immunity on grounds that at the time of their statements the law was unclear that the right to practice a chosen career was constitutionally protected. As to the pendent state claim, Respondents postulated absolute immunity under state law for acts in connection with their official duties and in reporting judicial decisions, and that defamation was not averred with the particularity required by New York's *Civil Practice Law & Rules* ("C.P.L.R.").

By September 22, 1988 Opinion and Order (A1-10), the district court denied the motion. Regarding the civil rights cause, the lower court determined that at all relevant times the law was clearly established that stigmatizing government defamation resulting in deprivation of the ability to engage in a chosen occupation makes out a claim for loss of liberty without due process of law. As to the pendent state law cause, the court held that the statements were neither made in connection with official duties nor in report of a judicial proceeding, and that the federal pleading rules – not the New York C.P.L.R. – governed here, and those applicable rules were satisfied.

Respondents then appealed the district court's decision only insofar as it rejected their claim to federal qualified immunity. Petitioner moved both to dismiss the appeal as improperly taken from an interlocutory order and to oppose the substance.

By Decision and Judgment dated and entered March 3, 1989 (A11-24), the Second Circuit Court of Appeals reversed and remanded with instructions to dismiss the complaint. As to appealability, the circuit held that for purposes of the appeal the allegations of the pleading were deemed true, the issues were thus purely of law, and the denial of immunity was therefore within the "collateral order" doctrine and appealable on authority of *Mitchell v. Forsyth*, 472 U.S. 511. On substance, the

Second Circuit analyzed the facts of each of its prior qualified immunity decisions; determined that as a factual matter none of them had found due process violations by stigmatization in the absence of a loss of public employment or a state created property right; and held that, as a result, the law was not clear that stigmatization absent in any other circumstance implicates due process property or liberty rights. Thus, the court of appeals reversed, and remanded to the district court with instructions to dismiss.

This petition follows.

REASONS FOR GRANTING THE WRIT

I.

THE SECOND CIRCUIT DECISION GRANTING IMMUNITY IS IN CONFLICT WITH THIS COURT'S DECISIONS ESTABLISHING THE SCOPE OF AVAILABLE IMMUNITY AND WITH OTHER CIRCUIT DECISIONS AS TO THE SCOPE OF PROTECTABLE LIBERTY INTERESTS

This petition presents two important constitutional issues frequently recurring in civil rights litigation. First, under what circumstances does damage to business and reputation implicate protected liberty interests satisfying the "plus" element of *Paul v. Davis*, 424 U.S. 693 (1976), so as to give rise to a Fourteenth Amendment due process claim for stigmatizing statements by government officials? This is an issue on which the circuits are in conflict. Second, in affording Respondents immunity here, the court of appeals applied a standard so restrictive as to essentially require a prior four-square holding before subjecting a government official to adjudication of a claim against him. This dangerous precedent, in conflict with this Court's prior determinations, threatens to freeze the evolutionary development of constitutional principles.

Public officials are immune from liability under the civil rights statutes *only* if their conduct is not reasonably framed in light of the law then extant.

> [O]ur cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he was doing violates that right. *This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful*, but it is to say that in the light of preexisting law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. ____, 107 S.Ct. 3034, 3039 (1987)(emphasis added)(citations omitted). *See also Mitchell v. Forsyth*, 472 U.S. at 535, n.12 ("We do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances.").

Therefore, the official's conduct is tested by an objective reasonableness standard:

> The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action.

Harlow v. Fitzgerald , 457 U.S. 800, 819 (1982). Thus, existing precedent need not be precise if a reasonable official should have related its principles to the situation at issue; a factual wrinkle does not defeat a Civil Rights Act claim. *See also Hicks v. Feeney*, 770 F.2d 375 (3d Cir. 1985); *Lappe v. Loeffelholz*, 815 F.2d 1173 (8th Cir. 1987).

This principle is founded on sound policy, for to require factual precision to escape immunity protection would create a "Catch 22" forever precluding the evolution of constitutional boundaries on official conduct. Any action without a previous four-square factual precedent would be dismissed at its incipient stages on immunity grounds; no new precedent could develop.

Here, the unlawfulness of Respondents' conduct is apparent in the light of preexisting law.

In *Paul v. Davis*, 424 U.S. 693, the Court determined that stigmatization by government officials of itself did not implicate due process guarantees, but that the stigmatizing statement must result in the deprivation of a liberty or property interest

cognizable under the Fourteenth Amendment. Consequently, the *Paul v. Davis* formulation established what is now widely termed the "stigma-plus" test, leaving it to the circuits in the first instance to contour the additional elements necessary to convert stigmatizing statements into violations of constitutional proportion. *See, e.g., Moore v. Otero*, 557 F.2d 435, 437 (5th Cir. 1977); *Sullivan v. Brown*, 544 F.2d 279, 283-84 (6th Cir. 1976); *Colaizzi v. Walker*, 542 F.2d 969, 973-74 (7th Cir. 1976); *Stretten v. Wadsworth Veterans Hospital*, 537 F.2d 361, 365-66 (9th Cir. 1976); *Poirer v. Hodges*, 445 F.Supp. 838, 843 (M.D. Fla. 1978).

Paul v. Davis did not purport to delineate each circumstance constituting deprivation of a liberty interest:

> There are other interests, of course, protected not by virtue of their recognition by the law of a particular State but because they are guaranteed in one of the provisions of the Bill of Rights which has been "incorporated" into the Fourteenth Amendment. Section 1983 makes a deprivation of such rights actionable independently of state law. See *Monroe v. Pape*, 365 U.S. 167 (1961).
>
> Our discussion in Part III is limited to consideration of the procedural guarantees of the Due Process Clause *and is not intended to describe those substantive limitations upon state action which may be encompassed within the concept of "liberty" expressed in the Fourteenth Amendment.* Cf. Part IV, *infra*.

424 U.S. at 710-11, n.5 (emphasis added). Accordingly, whether the *Paul* "plus" element is satisfied in stigmatization claims alleging loss of a Fourteenth Amendment "liberty" interest is determined by reference to other decisions defining "liberty".

The decisions of this Court have long established that the right to pursue one's livelihood is a protected liberty interest. Specifically, in *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court defined liberty as including "the right of the individual . . . to engage in any of the common occupations of life." *Id.* at 399.

Meyer's vitality in this regard was confirmed more recently in *Board of Regents v. Roth*, 408 U.S. 564 (1972), *quoting Meyer* for this very proposition. *Id.* at 572.[3]

Nevertheless, in conflict with the established precedent of this Court, the court of appeals here dismissed, holding that the law is not settled that stigmatizing statements foreclosing the right to pursue a chosen career is a constitutional violation. To navigate the shoals of conflicting controlling authority, the circuit court justified its decision by a detailed factual analysis of each of its prior precedents (*see* n.3 below), holding that no case had specifically found a constitutional violation in the absence of termination of public employment. Indeed, the court's minute factual distinctions compelled it to distinguish *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, on the ground that there the private employment terminated was in fact "quasi-public" because the Defendant, although private, was publicly funded. *See* A20-21.

But this analysis misperceives the thrust and import of this Court's line of qualified immunity cases, culminating most

---

[3] Moreover, the Second Circuit itself in dicta repeatedly recognized that the liberty interest, as defined by this Court, includes the right to pursue a chosen occupation. *Huntley v. Community School Board*, 543 F.2d 979 (2d Cir. 1976), *cert. denied*, 430 U.S. 929 (1977)(public school principal's due process rights were violated when in the process of his termination, public remarks were made stigmatizing him and making it unlikely that he would find future employment in a similar capacity in education); *Baden v. Koch*, 799 F.2d 825 (2d Cir. 1986)(citing *Meyer* to effect that stigmatizing statements foreclosing other employment opportunities are entitled to constitutional redress); *Rudow v. City of New York*, 822 F.2d 324, 330 (2d Cir. 1987)(claims of constitutional dimension arising from false administrative prosecution for sexual harassment dismissed because Plaintiff had not "been prevented from practicing his profession"); *Brandt v. Board of Cooperative Educational Services*, 820 F.2d 41 (2d Cir. 1987)(upholding complaint where state employee dismissed with stigmatizing statements placed in his file); *S & D Maintenance Co., Inc. v. Goldin*, 844 F.2d 962, 971 (2d Cir. 1988)(government contractor's complaint dismissed as to stigmatization allegations *solely* because of failure to allege that stigmatizing charges were false); *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 446 (2d Cir. 1980)(stigmatizing dismissal of quasi-public employee, citing *Meyer*).

recently in *Anderson v. Creighton*, 107 S.Ct. 3034. The point of the Second Circuit's cases should not be to require factual precision of prior analysis, but rather to require only that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.*, 107 S.Ct. at 3039. Accordingly, that no prior case had specifically found for a Plaintiff demonstrating that his career was foreclosed does not mean that no such Plaintiff can succeed, or that qualified immunity attaches against all such claims. Otherwise, case law development would be foreclosed, a result against which the Second Circuit itself has cautioned:

> The "liberty" protected by the Fourteenth Amendment against arbitrary governmental interference is a necessarily amorphous concept, which continues to evolve as courts apply it to the specific circumstances of individual cases.

Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d at 441-42.

Thus, although paying lip service to the *Anderson v. Creighton* qualified immunity standard, the Second Circuit in fact determined this action in utter derogation of that standard. Notwithstanding that for purposes of the appeal Petitioner had conclusively demonstrated that Respondents' conduct foreclosed his chosen career (*see* p.4, n.2, *supra*), and that established authority included the right to pursue a chosen career within the ambit of Fourteenth Amendment liberty protection, the court of appeals afforded qualified immunity to the stigmatizing conduct depriving Petitioner of his chosen career. In so doing, the circuit court engaged in the detailed factual analysis abjured by this Court in *Anderson*. Thus, to permit the Second Circuit's analysis to stand is to permit dangerous precedent threatening the evolutionary development of constitutional parameters.

Moreover, not only did the Second Circuit's analysis conflict with qualified immunity standards established by this Court, it also conflicted with other circuits' correct determinations that stigmatization resulting in damage to business reputation and goodwill is constitutionally actionable. For example, the Eleventh

Circuit in *Little v. City of North Miami*, 805 F.2d 962 (1986), reversed dismissal of Plaintiff's due process stigmatization case arising from a law professor's public censure by the Defendant's City Council. The court of appeals there relevantly noted:

> Experience has proven that personal reputation, standing alone, is not a property or liberty interest which may serve as the basis of a Section 1983 claim. *Paul*, 424 U.S. at 712, 96 S.Ct. at 1165; *Campbell v. Pierce County*, 741 F.2d 1342, 1344 (11th Cir. 1984), *reh'g. denied*, 747 F.2d 710 (1984). This Court has acknowledged and reaffirmed, however, that business reputation/goodwill is both a property and a liberty interest which is protectable under the scope of Section 1983. *Marrero v. City of Hialeah*, 625 F.2d 499, 514-16 (5th Cir. 1980), *cert. denied*, 450 U.S. 913, 101 S.Ct. 1353, 67 L.Ed.2d 337 (1981); *Economic Development Corp. of Dade County, Inc. v. Stierheim*, 782 F.2d 952, 954-55 (11th Cir. 1986); *Emory v. Peeler*, 756 F.2d 1547, 1554 (11th Cir. 1985); *Espanola Way Corp. v. Meyerson*, 690 F.2d 827, 829 (11th Cir. 1982), *cert. denied*, 460 U.S. 1034, 103 S.Ct. 1431, 75 L.Ed.2d 791 (1983).

805 F.2d at 969 (emphasis in original). *See also Gardiner v. A.H. Robins Co.*, 747 F.2d 1180, 1191 (8th Cir. 1984)(A judge's comments from the bench concerning the conduct of officers of a corporate party "constituted an infringement on the officers' liberty interests because it was a governmental attack on their good name, reputation, honor and community standing.").

Here, Petitioner has alleged far more than damage to his business or reputation: he has (for present purposes) conclusively affirmed his total preclusion from pursuit of his livelihood. *A fortiori*, under *Little* and *Gardiner*, Petitioner would be entitled to pursue his claim through discovery and trial.

Consequently, the Second Circuit's decision dismissing the complaint and affording qualified immunity is in conflict with

the Eleventh and Eighth Circuits. Concededly, the court of appeals' decision here is in accord with *Havas v. Thornton*, 609 F.2d 372 (9th Cir. 1979), but this only serves to highlight the conflict among the circuits on a recurrent and important issue: the extent of economic damage necessary to satisfy the *Paul v. Davis* "plus" element to assert a constitutional due process stigmatization claim.

Here, the damages are as severe as can be, resulting in complete deprivation of Petitioner's right to pursue his chosen career, thus violating Petitioner's liberty interest as defined in *Meyer v. Nebraska*, 262 U.S. 390, as reaffirmed in *Board of Regents v. Roth*, 408 U.S. 564. To establish beyond peradventure that the law is settled that this is a liberty interest protected against governmental stigmatization, to resolve any doubt among the circuits on this frequently recurring issue, and to reject the dangerous Second Circuit extension of qualified immunity in conflict with this Court's prior determinations, Petitioner respectfully requests that this petition be granted.

II.

IN FAILING TO DISMISS THE APPEAL, THE SECOND CIRCUIT EXPANDED THE SCOPE OF THE COLLATERAL ORDER DOCTRINE AS APPLIED TO IMMUNITY BEYOND THAT INTENDED BY THIS COURT

Mitchell v. Forsyth, 472 U.S. 511, established the general interlocutory appealability of the denial of immunity to government officials under the collateral order doctrine. This Court reasoned that the import of immunity is to shield against the expense and burden of litigation and its concommitant chilling effect on the exercise of official discretion. *Id.* at 524-29. Here, however, neither relevant policy consideration is applicable since Respondents' conduct was not in the exercise of official duties and Respondents will necessarily be subject to litigation in the state courts if this petition is denied.*

In their initial motion, Respondents prayed dismissal of the pendent state claims even if federal immunity was denied, arguing that New York State law afforded Respondents immunity here. The district court rejected Respondents' contentions, and stated in pertinent part:

> The Defendants next contend that as state officials they are absolutely immune from suit for defamation stemming from statements made "in connection with" their official duties. However, the standard applied by the New York Court of Appeals is somewhat stricter. That court has stated that an official is
>
> > absolutely immune from liability for allegedly defamatory remarks related to his responsibilities *and made during the course of the performance of his duties.*

---

* This issue was preserved by Petitioner's motion to dismiss the appeal (on the grounds that factual determinations were necessarily involved), and in his brief insofar as it argued the absence of policy justification for immunity here.

> This does not mean, however, that absolute immunity attaches to every statement made by a[n official]. Both the subject of the statement and the circumstances in which it is made are of importance in determining whether a particular statement was privileged.
>
> *Clark v. McGee*, 49 N.Y.2d 613, 404 N.E.2d 1283, 427 N.Y.S.2d 740, 744 (1980)(emphasis added).
>
> In this case, the Defendants allegedly made the offending statements not in the course of their duties as Commissioner and Deputy Commissioner for the State of New York, but at a convention of other insurance commissioners. The complaint sets forth that the statements were made to discrete attendants at the convention and not in the discharge of duties by, for example, warning all commissioners of the alleged wrongful deeds of individuals who could potentially practice in any of the fifty states. That is, the complaint seemingly indicates that the statements were made in social conversation. This does not satisfy the requirements of *Clark*.
>
> Moreover, some of the statements allegedly made by Randolph were that Neu was a swindler, operated a scam in New York, and associated with criminals. These are not necessarily relevant to the auto repair business or the insurance business, the Defendants' field of regulation, and thus would not fall under the privilege as enumerated by *Clark*. *See also Cosme v. Town of Islip*, 102 A.D.2d 717, 476 N.Y.S.2d 857 (1st Dept.), *aff'd*, 63 N.Y.2d 908, 472 N.E.2d 1033, 483 N.Y.S.2d 205 (1984).

(Emphasis in original) A7-8.

Respondents' appeal was limited to the issue of federal qualified immunity, and the Second Circuit dismissed the state claim solely because the federal claims were dismissed (A22).

Therefore, the district court's determination rejecting state immunity stands, and Respondents are consequently subject to trial in the state courts regarding the very same transactions for which they have received federal immunity.

Thus, the *Mitchell* rationale for permitting collateral appeal from denial of immunity – that is, to shield officials from litigation – is inapposite here. Regardless of the federal immunity afforded, Respondents will be subject to litigation of the same issues, albeit in a state forum. Consequently, to allow collateral appeal in these circumstances is to constitute federal qualified immunity as a forum selection device. Once it is determined that Respondents should stand trial somewhere for their challenged conduct, the rationale underlying interlocutory appeals on qualified immunity no longer attends.

This is especially true here, where the immunity claim is based *not* on the propriety of Respondents' actions, but on whether the consequences of their conduct were sufficiently severe to found a cognizable constitutional claim. Respondents' argument below was premised entirely on *Paul v. Davis*, in which the sole issue was to what extent the Constitution federalized state tort violations. 424 U.S. at 699-701. The question was *not* whether a state law violation was committed in the first instance. Here, the unchallenged district court determination is that the complaint properly states claims for state law violations not immunized under state law.

Thus, in relying exclusively on *Paul*, Respondents posit entitlement to immunity even if they objectively should know that their conduct subjects them to liability for state law violations, and the only arguably open question is whether it also violated the Constitution. Public policy is not served by this circumstance. The immunity claimed here is qualified, as opposed to absolute, to retain a deterrent effect against unlawful conduct by public officials. *Harlow v. Fitzgerald*, 457 U.S. at 819. State officials should be deterred from all unlawful conduct – state and federal – for the public has the right to expect that its government, at all levels, will act in an entirely lawful manner.

Accordingly, extending the collateral order doctrine beyond the *Mitchell* rationale to allow interlocutory appeals where State officials nevertheless must submit to adjudication of state law violations runs contrary to the public interest. Therefore, this petition should be granted to reject the unwarranted extension of the collateral order doctrine as applied to immunity in contravention of the general rule disfavoring interlocutory appeals.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a writ of *certiorari* be granted for review of the judgment of the Second Circuit Court of Appeals.

Respectfully submitted,

ANDREW J. GOODMAN
(Counsel of Record)
ROSNER & GOODMAN
342 Madison Avenue
New York, New York 10173
(212) 661-2150

Counsel for Petitioner

Dated: June 1, 1989

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NICHOLAS NEU,

Plaintiff,

– against –

JAMES P. CORCORAN, individually, and as Superintendent of Insurance of the State of New York and JAMES W. RANDOLPH, individually and as Deputy Superintendent of the State of New York,

Defendants.

OPINION
88 Civ. 1495 (RWS)

APPEARANCES:

ROSNER & GOODMAN, ESQS.
Attorneys for Plaintiff
342 Madison Avenue
New York, New York 10173
By: ANDREW J. GOODMAN, ESQ.
Of Counsel

HON. ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Defendants
120 Broadway
New York, New York 10271
By: ANN HOROWITZ, ESQ.
AUGUST L. FIETKAU, ESQ.
Assistant Attorney General
Of Counsel

Sweet, D.J.

Defendants James P. Corcoran, individually and as Superintendent of Insurance of the State of New York ("Corcoran"), and James W. Randolph, individually and as Deputy Superintendent of Insurance of the State of New York ("Randolph") (collectively the "defendants") have moved pursuant to Rule 12(b)(6), Fed.R.Civ.P. to dismiss the claim filed against them by Nicholas Neu ("Neu") for failure to state a claim upon which relief may be granted. For the reasons set forth below, the motion is denied.

Facts

From February 1985 through March 11, 1987, Neu was president of the American Motor Club, Inc. ("AMC"), a New York corporation engaged in selling pre-paid automobile collision contracts to the public. In 1985, the New York Insurance Department commenced a proceeding against AMC and an individual defendant in the Supreme Court of the State of New York. Neu was deemed a party to that action by the court on April 8, 1987 and was deemed to have answered by October 31, 1985. The petition in that proceeding alleged that AMC was selling insurance to the public in violation of the law of the State of New York.

Based on the evidence adduced at that trial, the New York Supreme Court rendered a decision holding that AMC was engaged in the illegal sale of insurance but that the respondents did not willfully violate the law. The judgment of April 8, 1987 assessed sanctions against Neu and another and appointed Randolph receiver of AMC. That judgment was appealed by Neu. In October 1987, the Appellate Division, First Department affirmed the court below insofar as it held that AMC was engaged in the unauthorized sale of insurance but reversed the judgment to the extent it imposed monetary sanction against Neu based on the ground that Neu's procedural due process rights had been violated.

In June 1987, after the Supreme Court ruling but before the Appellate Division ruling, while Neu was engaged in the prepaid

collision service business in California, the Defendants allegedly made disparaging remarks regarding Neu at a convention of Insurance Commissioners. The Defendants allegedly stated to the California and Louisiana Insurance Commissioners that Neu did not honor contracts, did not repair vehicles, and that he drove AMC into bankruptcy and associated with criminals. Neu, however, contends that it was during Randolph's stewardship that AMC abandoned its members and their vehicles, and that AMC was solvent when he left its employ. Thus, as a result of the Defendants' allegedly false statements Neu claims that his reputation was ruined and that he was forced out of the insurance business.

Prior Procedure

Neu filed this action on March 4, 1988 alleging deprivation of liberty without due process of law pursuant to 42 U.S.C. § 1983 and common law defamation. The defendants filed this motion to dismiss Neu's claims on April 15, 1988. This court heard oral argument and deemed the motion fully submitted on June 24, 1988.

Discussion

Federal Liability

42 U.S.C. § 1983 creates a cause of action against

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof the deprivation of any rights, privileges, or immunities secured by the Constitution and laws. . . .

Thus, in examining a section 1983 claim, a court must determine "(1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United

States." *Parratt v. Taylor*, 451 U.S. 527, 535 (1980). For the purposes of this motion, the defendants do not challenge that their alleged actions were committed under color of state law. However, they contend that the complaint does not allege the deprivation of a liberty right entitling Neu to a right of action in federal court.

In *Paul v. Davis*, 424 U.S. 693 (1976), *cert. denied*, 430 U.S. 929 (1977), the Supreme Court held that defamation of an individual by a public official did not deprive that individual of a liberty interest secured by the Constitution. The Court held that while damage to reputation constituted a state law cause of action for defamation, section 1983 could not be utilized to transform all such actions into federal claims through the fourteenth amendment thereby rendering that amendment a "font of tort law." *Id.* at 701. The Court, in examining older cases, determined that to be actionable, damage to reputation must be accompanied by damage of some tangible interest, such as loss of government employment, *id.* at 706, or loss of a right or status previously recognized by state law, *id.* at 711.

Cases in this circuit have reaffirmed *Paul*'s requirement of "reputation plus" for setting forth a claim of deprivation of liberty under the fourteenth amendment based on defamation.

In *Huntley v. Community School Board*, 543 F.2d 979 (2d Cir. 1976), *cert. denied*, 430 U.S. 929 (1977), the Second Circuit held that a public school principal's due process rights were violated when in the process of his termination, public remarks were made stigmatizing him and making it unlikely that he would find future employment in a similar capacity in the public schools or elsewhere.

In *Baden v. Koch*, 799 F.2d 825 (2d Cir. 1986), the court held that a Chief Medical Examiner's demotion to Deputy Chief Medical Examiner with accompanying damaging public announcements did not set forth a claim under section 1983 because the state actions did not result in his being foreclosed from a range of opportunities. *Baden* quotes from *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), which states that fourteenth amendment liberty interests include the right "to engage in any of the

common occupations of life." *Baden*, *supra*, 799 F.2d at 829. However, the court went on to discuss how the Supreme Court has "refined the parameters of liberty," citing such cases as *Paul v. Davis*, and *Board of Regents v. Roth*, 408 U.S. 564 (1972) (no property or liberty interest implicated when state fails to rehire non-tenured teacher absent charges against him amounting to stigma or foreclosing other employment). Moreover, the Second Circuit in *Baden* stated that Baden's interest was less significant than many asserted in Supreme Court cases in that Baden was not terminated and "not 'not rehired' " but was merely demoted. 799 F.2d at 830. Thus, since *Baden* was able to continue to work in his chosen profession, he did not suffer a deprivation of liberty.

Recently, in *Rudow v. City of New York*, 822 F.2d 324 (2d Cir. 1987), the court held that an executive who suffered loss of job, poor health, and public humiliation based on charges of sexual harassment did not set forth a cause of action under section 1983 against the state's attorney. That attorney had prosecuted the action without discovering that the victim had fabricated evidence. The court held that Rudow had failed to satisfy the "reputation plus" test as he had not suffered the loss of public employment nor had he been prevented from practicing his profession. 822 F.2d at 330. The court held that "[h]is loss of the top job at his firm is an inadequate addendum to his reputation claim. . . . He has not been prevented from engaging in the everyday activities of life. . . . The collateral consequences of his being adjudged guilty of sexual harassment do not abridge a property right to his business reputation, as they might if that right were based on a statute." *Id.* (citations omitted); *see also Brandt v. Board of Cooperative Educational Services*, 820 F.2d 41 (2d Cir. 1987) (upholding the complaint in case where state employee was dismissed and stigmatizing statements were placed in employment file).

These cases stand for the proposition that in order to make out a claim for loss of liberty without due process of law stemming from governmental defamation, the plaintiff must allege damage to reputation, plus deprivation of the ability to engage

in the everyday activities of his life, apparently construed to mean his chosen occupation. Taking the allegations in the complaint to be true for the purposes of this motion, *Conley v. Gibson*, 355 U.S. 41, 45 (1957), Neu alleged such loss. His complaint states that because of the Defendants' defamatory statements, he was precluded from engaging in his chosen profession, namely, the auto repair contract business. Under *Huntley*, *Baden*, and *Rudow*, allegations of foreclosure from practicing one's chosen profession together with stigmatizing remarks constitute a cause of action under 42 U.S.C. § 1983.

Federal Immunity

The Defendants next assert that even if Neu has stated a cause of action based on deprivation of liberty, they are entitled to immunity under federal law. The parties agree that the Supreme Court case of *Anderson v. Creighton*, 107 S. Ct. 3034 (1987) is controlling on this question. The Court in that case held that public officials are entitled to qualified immunity unless the actions taken were clearly proscribed by law. Thus, the court stated:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right. This is not to say that an official action is protected by qualified immunity unless the action in question has previously been held unlawful, . . . but it is to say that in light of preexisting law the unlawfulness must be apparent.

Id. at 3039 (citations omitted).

The Defendants rely on *Paul v. Davis* to stand for the proposition that there is no preexisting law making it evident that the statements allegedly made by the Defendants violated Neu's constitutional rights. However, as set forth above, this circuit has held that an individual has a liberty interest in maintaining reputation plus the right to engage in his chosen profession. Both *Huntley* and *Baden* were decided before the Defendants

made the allegedly defamatory statements. Therefore law forbidding such conduct was extant, and the Defendants can not avail themselves of qualified immunity.

Pleading a State Cause of Action

Corcoran and Randolph have next moved to dismiss Neu's state cause of action on the ground that Neu has failed to plead the allegedly defamatory remarks in *haec verba*, as required by New York Civil Practice Law and Rules § 3016(a). However, as this action was commenced in federal court, the Federal Rules of Civil Procedure control the applicable pleading standards. Thus, "the mode of pleading defamation is governed by Rule 8, Fed.R.Civ.P., which requires only that plaintiff's charges be set forth in a short and concise statement, detailed only to the extent necessary to enable defendant to respond and to raise the defense of res judicata if appropriate." *Geisler v. Petrocelli*, 616 F.2d 636, 640 (2d Cir. 1980).

Immunity under State Law

Official Immunity

The Defendants next contend that as state officials, they are absolutely immune from suit for defamation stemming from statements made "in connection with" their official duties. However, the standard applied by the New York Court of Appeals is somewhat stricter. That court has stated that an official is

> absolutely immune from liability for allegedly defamatory remarks related to his responsibilities *and made during the course of the performance of his duties.*
>
> This does not mean, however, that absolute immunity attaches to every statement made by a[n official]. Both the subject of the statement and the circumstances in which it is made are of importance in determining whether a particular statement was privileged.

Clark v. McGee, 49 N.Y.2d 613, 404 N.E.2d 1283, 427 N.Y.S.2d 740, 744 (1980) (emphasis added).

In this case, the Defendants allegedly made the offending statements not in the course of their duties as Commissioner and Deputy Commissioner for the State of New York, but at a convention of other insurance commissioners. The complaint sets forth that the statements were made to discrete attendants at the convention and not in the discharge of duties by, for example, warning all commissioners of the alleged wrongful deeds of individuals who could potentially practice in any of the fifty states. That is, the complaint seemingly indicates that the statements were made in social conversation. This does not satisfy the requirements of *Clark*.

Moreover, some of the statements allegedly made by Randolph were that Neu was a swindler, operated a scam in New York, and associated with criminals. These are not necessarily relevant to the auto repair business or the insurance business, the Defendants' field of regulation, and thus would not fall under the privilege as enumerated by *Clark*. *See also Cosme v. Town of Islip*, 102 A.D.2d 717, 476 N.Y.D.[sic] 2d 857 (1st Dep't.), *aff'd*, 63 N.Y.2d 908, 472 N.E.2d 1033, 483 N.Y.S.2d 205 (1984).

In sum, the Defendants have not set forth a claim of privilege sufficient to overcome the allegations set forth in the complaint. As this court must take those allegations to be true for the purposes of this motion, the motion to dismiss on these grounds is denied.

Immunity in Reporting Judicial Decisions

Finally, the Defendants claim immunity for suit for defamation under New York Civil Rights Law § 74. That section provides:

> A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or any heading of the report which is a fair and true headnote of the statement published.

> This section does not apply to a libel contained in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of such a proceeding which was not a part thereof.

The seminal case on the exception to this privilege is *Williams v. Williams*, 23 N.Y.2d 592, 246 N.E.2d 333, 298 N.Y.S.2d 473 (1969), a case where a plaintiff had instituted a judicial proceeding alleging false and defamatory charges and then made communications based on the proceeding. *See Branca v. Mayesh*, 63 N.Y.2d 994, 473 N.E.2d 261, 483 N.Y.S.2d 1011 (1984). In *Williams*, the New York Court of Appeals examined the legislative history behind section 74, noting that the original statute came about to protect public reporting of judicial proceedings, such as in newspapers and publications. It determined that

> The purpose of section 74 of the Civil Rights Law. . . is the protection of reports of judicial proceedings which are made in the public interest. . . . It would be contrary to reason to say that the Legislature considered it necessary to protect such defamation in order to implement the salutary aims of the statute.

298 N.Y.S.2d at 479.

The statements alleged here do not fall under this statute. They were not, as set forth in the complaint, remarks made for the benefit of the general public, but remarks made for a few select ears. They were not, in truth, reports of judicial proceedings. They were, as pleaded, personal comments about the plaintiff. The complaint does not allege that the Defendants said the "the court said X or held X about Neu." The complaint alleges that the Defendants said, for example, that Neu is a swindler and that Neu does not perform his duties. This does not constitute reporting on judicial proceedings. Thus, the Defendants cannot avail themselves of the protection of this section against the complaint.

Conclusion

For the reasons set forth above, Defendants' motion to dismiss the complaint for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6), Fed.R.Civ.P. is denied.

It is so ordered.

New York, N.Y.
September 22, 1988

ROBERT W. SWEET
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 725 — August Term 1988
Argued: January 25, 1989 Decided: March 3, 1989
Docket No. 88-7914

NICHOLAS NEU,

Plaintiff-Appellee,

v.

JAMES P. CORCORAN, Individually and as Superintendent of Insurance of the State of New York, and JAMES W. RANDOLPH, Individually and as Deputy Superintendent of Insurance of the State of New York,

Defendants-Appellants.

Before: NEWMAN, PIERCE, and MAHONEY, *Circuit Judges*.

Appeal from an order of the District Court for the Southern District of New York (Robert W. Sweet, Judge) denying a motion to dismiss, on grounds of qualified immunity, a suit alleging defamation by state officials.

Reversed and remanded with directions to dismiss.

August L. Fietkau, Asst. Atty. Gen., New York, N.Y. (Robert Abrams, Atty. Gen., Lawrence S. Kahn, Deputy Solicitor Gen., Frederic L. Lieberman, Asst. Atty. Gen., New York, N.Y., on the brief), for defendants-appellants.

Andrew J. Goodman, New York, N.Y. (Rosner & Goodman, New York, N.Y., on the brief), for plaintiff-appellee.

JON O. NEWMAN, *Circuit Judge*:

The principal issue on this appeal is whether qualified immunity shields a state official who defames a private citizen and thereby damages his career opportunities but without depriving the citizen of any legal right or status created by state law. The issue arises on an appeal by James P. Corcoran and James W. Randolph from an order of the District Court for the Southern District of New York (Robert W. Sweet, Judge) denying their motion to dismiss a due process claim brought by Nicholas Neu. *Neu v. Corcoran*, 695 F. Supp. 1552 (S.D.N.Y. 1988). We conclude that appellants are entitled to immunity because our prior cases have not clearly established that appellants' conduct deprived appellee Neu of a liberty interest protected by the due process guarantees of the Fourteenth Amendment. We therefore reverse and remand.

Background

From February 1985 through March 11, 1987, plaintiff-appellee Neu was president of American Motor Club, Inc. ("AMC"), a New York corporation engaged in selling prepaid automobile collision contracts to motorists in New York. The New York State Insurance Department filed charges against AMC in 1985, alleging that the company was engaged in the selling of insurance without a license. The Supreme Court of the State of New York upheld the charges in January 1987 and enjoined AMC from continuing its activities in the state. The Court also imposed monetary sanctions on Neu personally. In October 1987, New York's Appellate Division, First Department, affirmed the ruling that AMC was engaged in the unauthorized sale of insurance but reversed the fines against Neu. *People v. American Motor Club, Inc.*, 133 A.D.2d 593, 520 N.Y.S.2d 383 (1st Dep't 1987).

In March 1987, after the state Supreme Court's ruling, Neu began operating similar prepaid collision service companies in California. Neu's complaint in the pending litigation alleges that in June 1987 Corcoran, New York's superintendent of insurance, and Randolph, deputy superintendent, made defamatory remarks about Neu at a convention of insurance commissioners

in Chicago. Neu alleges that the New York officials falsely told other commissioners, including California's, that Neu did not honor his contracts, did not repair vehicles, was responsible for driving AMC into bankruptcy, knowingly violated the law, was a swindler, operated a scam in New York, and associated with criminals. Neu further alleges that as a result of those statements, his reputation was ruined and he was forced out of the automobile repair business, which was his sole livelihood. In particular, he alleges that the California Department of Insurance threatened to bring disciplinary action against insurance companies and brokers that engaged in business transactions with Neu's companies and that he was forced to resign from his California companies.

Neu's suit against Corcoran and Randolph was brought in the District Court for the Southern District of New York, pursuant to 42 U.S.C. § 1983 (1982). He alleged that the state officials, without due process, deprived him of a liberty interest by defaming him and casting a stigma on him that foreclosed a range of career opportunities and deprived him of the ability to engage in his occupation. He also brought a pendent state law claim for defamation.

Corcoran and Randolph moved, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss Neu's claim for failure to state a claim upon which relief may be granted and on the basis of official immunity under federal and state law. The District Court issued an order denying the motion. Corcoran and Randolph appeal from the order to the extent that it denied their official immunity defense to the federal claim.

Discussion

1. *Appellate Jurisdiction.* Although the denial of a motion to dismiss is ordinarily not an appealable "final decision" within the meaning of 28 U.S.C. § 1291 (1982), the "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), has been construed to permit interlocutory appeals from denials of substantial claims of qualified immunity. *See*

Mitchell v. Forsyth, 472 U.S. 511, 524-30 (1985). The entitlement to qualified immunity is an immunity from suit, rather than a mere defense to liability; therefore, it is effectively lost if a case is erroneously permitted to go to trial. *Id.* at 526. An order denying a defense of qualified immunity is immediately appealable, however, only where it can be decided as a matter of law and does not turn on disputed questions of fact. *Id.* at 530; *Lawson v. Abrams*, ____ F.2d ____, ____ (2d Cir. 1988); *White v. Frank*, 855 F.2d 956, 958 (2d Cir. 1988).

Neu contends that Corcoran's and Randolph's qualified immunity defense turns on disputed questions of fact and that the case is therefore not ripe for review under the collateral order doctrine. Specifically, he contends that whether appellants' alleged statements actually resulted in foreclosing Neu from engaging in his chosen occupation is a factual question requiring further inquiry in the District Court. We disagree. We think that the validity of appellants' qualified immunity defense to Neu's claims can be decided as a matter of law, accepting Neu's factual allegations as true for purposes of the appeal. We therefore have jurisdiction to review the immunity ruling.

2. *Qualified Immunity.* Government officials performing discretionary functions are not absolutely immune from liability for civil damages, but they are protected by qualified, or good-faith, immunity. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Qualified immunity shields officials from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. An official is liable only if the contours of the right he is alleged to have violated are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 107 S. Ct. 3034, 3039 (1987). The very action in question need not previously have been held unlawful, but the unlawfulness must be apparent in light of preexisting law. *Id.*

Neu alleges that appellants, acting under color of state law, deprived him of a liberty interest without due process by making defamatory statements that led to foreclosure of his ability

to engage in his chosen occupation, the auto repair contract business. The District Court concluded that this adequately stated a claim for relief under section 1983. *Neu v. Corcoran*, 695 F. Supp. at 1555. The District Judge also found that the right to due process under such circumstances had been clearly established by decisions of this Circuit. *Id.* at 1556. The Court cited two cases for this proposition, *Huntley v. Community School Board*, 543 F.2d 979 (2d Cir. 1976), *cert. denied*, 430 U.S. 929 (1977), and *Baden v. Koch*, 799 F.2d 825 (2d Cir. 1986), both of which were decided before the alleged defamation took place.

Whether or not the District Court is correct that Neu adequately alleged deprivation of a liberty interest to state a claim for relief under 42 U.S.C. § 1983, a matter we do not decide, we do not agree that *Huntley*, *Baden*, or any of our other decisions clearly established in 1987 that appellants' alleged actions constituted a deprivation of a protected liberty interest. Unlike the case at bar, *Huntley* and *Baden* both involved defamation of *government employees* who were allegedly defamed *in the course of being dismissed or demoted.* To explain why this distinction is significant, we must survey cases in the Supreme Court and in this Circuit explicating the constitutional standards concerning defamation by government officials.

In *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the Supreme Court considered the constitutionality of a state statute that provided for the posting in liquor stores of a list of persons who tended to become violent after excessive drinking and who were forbidden from purchasing alcohol for one year. The statute did not provide the persons listed with notice or opportunity for a hearing. The Court, finding that the State had attached a "badge of infamy" to the plaintiff, concluded that due process protections were required. *Id.* at 437. The Court stated that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Id.*

The Court again considered the issue of what constitutes a constitutional deprivation the following year in *Board of Regents*

v. Roth, 408 U.S. 564 (1972), a case involving a non-tenured teacher at a state university who was not rehired after his one-year contract expired. *Roth* held that the teacher had no property interest in his job because state law did not guarantee him a right to renew his contract.

In discussing whether the plaintiff in *Roth* had been deprived of a liberty interest, the Court noted that liberty, as protected by the Fourteenth Amendment, included a number of rights, including the right " 'to engage in any of the common occupations of life.' " *Id.* at 572 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The Court said there might be cases "in which a State *refused to re-employ a person* under such circumstances that interests in liberty would be implicated" but that *Roth* was not such a case. *Id.* at 573 (emphasis added). The Court also said there was no suggestion that the State, "*in declining to re-employ the respondent*, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." *Id.* (emphasis added).

The Court revisited the issue of governmental defamation in *Paul v. Davis*, 424 U.S. 693 (1976). In *Paul*, a local police chief circulated flyers to area retail stores with "mug shots" of persons deemed to be "active shoplifters." The plaintiff, who had been arrested for shoplifting but not yet tried, contended that the flyers defamed him and that, under *Wisconsin v. Constantineau*, *supra*, he was entitled to due process. He alleged that as a consequence of the posters, he had received a warning from his employer, although he had not been fired. The Court found that the plaintiff had not been deprived of either a property or liberty interest that would trigger due process protections.

The Court in *Paul* expressed the concern that the Fourteenth Amendment not be interpreted so broadly as to turn every state-law tort committed by a state official into a constitutional violation. *Id.* at 699. The Court said that its prior cases dealing with "stigma" resulting from defamation by government officials did "not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either

'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." *Id.* at 701.

The Court noted that *Constantineau* had said that due process rights were triggered " '[w]here a person's good name, reputation, honor, or integrity is at stake *because of what the government is doing to him.*' " *Id.* at 708 (quoting *Wisconsin v. Constantineau*, *supra*, 400 U.S. at 437)(emphasis added by *Paul*). The Court said the italicized phrase "referred to the fact that the governmental action taken in that case *deprived the individual of a right previously held under state law*" — the right to purchase or obtain liquor. *Id.* (emphasis added). Similarly, the Court said that "[w]hile *Roth* recognized that governmental action defaming an individual *in the course of declining to rehire him* could entitle the person to notice and an opportunity to be heard as to the defamation, its language is quite inconsistent with any notion that a defamation perpetrated by a government official but *unconnected with any refusal to rehire* would be actionable under the Fourteenth Amendment." *Id.* at 709 (emphasis added). The Court quoted two other passages from *Roth*, twice italicizing for emphasis the phrase *"in declining to rehire/re-employ the respondent."* *Id.*

The plaintiff's interest in his reputation, *Paul* said, "is simply one of a number [of interests] which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions." *Id.* at 712. Since the defendant state official, although defaming the plaintiff, had not deprived him of any right or status previously recognized by state law, the injury did not rise to the level of a constitutional deprivation. *Id.*[1]

Although *Paul* is the foundation for all subsequent cases dealing with governmental defamation, its meaning is not unambiguous. *See, e.g.*, 2 R. Rotunda, J. Nowak & J. Young, *Treatise on Constitutional Law* § 17.4, at 230 (1986)("One of the most disputed aspects of liberty in recent years is the degree to which the due process clauses protect the interest of an individual in his reputation."). *Paul* has been widely interpreted as holding that "stigma plus" is required to establish a constitutional

deprivation, *see, e.g., Moore v. Otero*, 557 F.2d 435, 437 (5th Cir. 1977), but it is not entirely clear what the "plus" is.

On the one hand, *Paul* suggested that reputation, together with "some more tangible interests such as employment," could constitute a liberty interest. 424 U.S. at 701. It did not say that "employment" had to be *government* employment. Thus, *Paul* might plausibly be interpreted as holding that any governmental defamation that causes a person to lose his job and impairs his ability to pursue his chosen profession or occupation is enough to constitute a deprivation of liberty, even if it does not occur in the course of dismissal from government employment or alteration of some other right or status recognized by state law. The "plus," in other words, might simply be that a consequence of the defamation was deprivation of the right, recognized in *Meyer v. Nebraska*, *supra*, "to engage in any of the common occupations of life."

On the other hand, *Paul* stressed that defamation alone did not constitute deprivation of a protected liberty interest, absent impairment of a right or status previously recognized by state law. The Court, commenting on *Roth's* discussion of reputation as a liberty interest, emphasized the fact that *Roth* had been discussing defamation by a state official *in the course of declining to rehire* the plaintiff as a state employee — state employment being a right or status recognized by state law. *Id.* at 709. *Paul* thus strongly suggests that defamation, even if it leads to a significant loss of employment opportunities, is not a deprivation of a liberty interest unless it occurs in the course of dismissal or refusal to rehire the individual as a government employee or during termination or alteration of some other legal right or status. Otherwise, *Paul* suggests, a defamation is merely a tort, cognizable at state law, but not a constitutional deprivation. Under this interpretation, the "plus" is not only significant damage to a person's employment opportunities but dismissal from a government job or deprivation of some other legal right or status.

Contrary to the District Court, we do not think our cases have clarified this ambiguity left by *Paul* nor have they clearly

established that defamation occurring other than in the course of dismissal from a government job or termination of some other legal right of status will suffice to constitute a deprivation of a liberty interest.

In *Gentile v. Wallen*, 562 F.2d 193 (2d Cir. 1977), a discharged public school teacher alleged that the school board had made defamatory statements about her to the state unemployment office. We noted that the alleged communication occurred *after* plaintiff had been terminated "and hence, *in the absence of an employment relationship*, amounted to at most the type of simple defamation that the Supreme Court held not to trigger due process rights in *Paul v. Davis*." *Id.* at 198 (emphasis added). The plaintiff in *Gentile* did not allege, however, that the defamation had precluded her from working elsewhere as a teacher; we therefore did not have occasion to determine whether that sort of damage would have rendered the defamation actionable as a deprivation of a liberty interest.

Huntley v. Community School Board, *supra*, involved a public school principal who alleged that he had been defamed in the course of his dismissal. We held that the plaintiff in *Huntley* was entitled to due process protections because his situation was the one contemplated hypothetically in *Roth*: " ' "the State, *in declining to re-employ the respondent*, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." ' " *Id.* at 986 (quoting *Paul v. Davis*, *supra*, 424 U.S. at 709 (quoting *Board of Regents v. Roth*, *supra*, 408 U.S. at 573))(emphasis added).

Like *Huntley*, *Brandt v. Board of Cooperative Educational Services*, 820 F.2d 41 (2d Cir. 1987), also involved allegations of defamation of a public school teacher who had been discharged and who alleged that the defamation imposed a stigma on him that precluded him from finding other employment. We ruled that in contrast to *Gentile v. Wallen*, *supra*, the defamatory statements were made *at the time of the plaintiff's termination*, 820 F.2d at 45, and therefore he had sufficiently alleged deprivation of a liberty interest.

Baden v. Koch, *supra*, also involved a due process claim by a government employee. In *Baden*, the plaintiff alleged that he had been defamed in the course of being demoted from a probationary position as New York City's chief medical examiner back to his position as deputy medical examiner. We ruled that the plaintiff "asserted at best a weak liberty interest." *Id.* at 831. We did not suggest that the plaintiff's liberty interests would have been implicated if he had been defamed outside the context of dismissal or demotion from his government job.

The only two cases of this Court that might arguably support Neu's position are *Rudow v. City of New York*, 822 F.2d 324 (2d Cir. 1987), and *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438 (2d Cir. 1980).

Rudow involved alleged defamation of a private citizen — not a government employee — by a city official. The plaintiff lost his job as a result of the alleged defamation, but he did not allege that he was foreclosed from finding other jobs in his field. We held that the plaintiff "competently alleged damage to his reputation, but has not offered a supplementary injury sufficient to meet the 'reputation-plus' standard of *Paul v. Davis*." *Id.* at 330.

In making that ruling, however, we noted that the plaintiff had not suffered a loss of public employment, "*nor has he been prevented from practicing his profession*." *Id.* (emphasis added). As Neu contends, the italicized phrase arguably suggests that the plaintiff would have had a sufficient claim if he had alleged that the stigma foreclosed him from practicing his profession, even though the defamation was not connected to any loss of government employment or legal status. But we decline to read this dictum from *Rudow* that broadly. The italicized phrase is followed by a citation to *Baden*, which was a public employee case. We do not think the panel in *Rudow* meant to extend the doctrine elaborated in *Baden*.

In *Quinn*, the plaintiff was an official of a not-for-profit corporation created to carry out urban redevelopment in Syracuse. He alleged that the Mayor of Syracuse deprived him of a liberty

interest without due process by defaming him and mounting a campaign to have him fired. We ruled that the plaintiff's allegations were sufficient to survive summary judgment, observing that "an individual's liberty can be implicated when a governmentally imposed stigma restricts his ability to seek and obtain employment." *Quinn v. Syracuse Model Neighborhood Corp., supra*, 613 F.2d at 446. We also noted that it was clear that the alleged defamation had occurred in the course of the termination of employment, *id.* at 446, but we did not focus on the issue of whether it was in the course of termination of *public* employment. The plaintiff's job may have been considered at least quasi-governmental, since his original appointment had come at the behest of the Mayor, *id.* at 442, and the employing corporation had received the vast majority of its funding from the federal government, allocated through the City of Syracuse. *Id.* at 442 n.1. Indeed, the District Court had assumed, for purposes of summary judgment, that the corporation's actions constituted "state action" under the Fourteenth Amendment. *Id.* In any event, the circumstances of *Quinn* are sufficiently unclear that we do not think it squarely establishes that governmental defamation, outside the context of discharge from governmental employment or similar termination of a legal right or status, can constitute a deprivation of a liberty interest.

This Court's recent opinion in *Walentas v. Lipper*, 862 F.2d 414 (2d Cir. 1988), bolsters our reading of *Rudow* and *Quinn*. In *Walentas*, the plaintiff was a real estate developer who had received preliminary approval by New York City to develop a stretch of waterfront land. He alleged that a city official defamed him in the course of withdrawing his designation as a developer. The city official asserted qualified immunity, and we upheld that defense. We held that it was not clearly established in 1984 (the time of the alleged defamation) that governmental defamation of a person *seeking* state employment (but not yet having obtained it) is a deprivation of a liberty interest for Fourteenth Amendment purposes, even if the defamation impairs the person's chances for other employment.

In light of these decisions, we do not think that the law of this Circuit clearly establishes that the governmental defamation

alleged by Neu rises to the level of a constitutional violation, rather than simply a state law tort.[2] Neu alleges that the New York officials made false statements about him that caused other states to take action against him. But the alleged defamation of Neu did not occur in the course of dismissal from a government job, nor did it come in the course of termination by New York of any other legal right or status enjoyed by Neu.[3] It would not be clear to a reasonable government official that the defamation Neu has alleged is a deprivation of a protected liberty interest that triggers due process requirements. We therefore conclude that Corcoran and Randolph are entitled to immunity with respect to Neu's federal claim. Since the federal claim encounters an insurmountable threshold obstacle, it would be inappropriate to exercise pendent jurisdiction over the state law claim.

We therefore reverse the order of the District Court and remand with directions to dismiss the complaint.

FOOTNOTES

[1] For a critique of the retrenchment in the scope of a protected liberty interest from *Wisconsin v. Constantineau*, *supra*, to *Paul v. Davis*, *supra*, *see* L. Tribe, *American Constitutional Law* § 10-11 (1988).

[2] Nor do cases from other circuits support Neu's claim. *See, e.g.*, *Goulding v. Feinglass*, 811 F.2d 1099, 1103 (7th Cir.) ("[A] liberty interest is not implicated merely by a reduction in an individual's attractiveness to potential employers. There is no legal barrier to [plaintiff's] pursuing his practice of law.") (quotation omitted), *cert. denied*, 107 S. Ct. 3215 (1987); *Naegele Outdoor Advertising Co. v. Moulton*, 773 F.2d 692, 702 (6th Cir. 1985)("[*Paul v.*] *Davis* holds that defamation alone will not suffice, but must accompany the alteration of a recognized interest or status created by the state"), *cert. denied*, 475 U.S. 1121 (1986); *Hadley v. County of Du Page*, 715 F.2d 1238, 1246 (7th Cir. 1983)("The key [to the 'stigma-plus' test] . . . is that the defamation must 'occur in the course of the termination of employment.' ")(quoting *Paul v. Davis*, *supra*, 424 U.S. at 710), *cert. denied*, 465 U.S. 1006 (1984); *Ray v. Tennessee Valley Authority*, 677 F.2d 818, 824 (11th Cir. 1982)(rejecting discharged public employee's due process claim where the alleged defamation "did not 'occur in connection with' the asserted deprivation of employment"), *cert. denied*, 459 U.S. 1147 (1983); *Havas v. Thornton*, 609 F.2d 372 (9th Cir. 1979)(holding that governmental defamation unconnected with any refusal to rehire, or to alteration or termination of a right or status previously recognized by state, is not a constitutional violation); *Rodriguez de Quinonez v. Perez*, 596 F.2d 486, 489 (1st Cir.)("While defamation by a governmental official, standing alone, does not work a deprivation of liberty protected by the fourteenth amendment, governmental action altering a right or status previously held under state law combined with the injury resulting from the defamation justifie[s] the invocation of procedural safeguards.")(citation and quotation omitted), *cert. denied*, 444 U.S. 840 (1979); *Bundy v. Rudd*, 581 F.2d 1126, 1131 (5th Cir. 1978)("To establish a liberty interest sufficient to implicate Fourteenth Amendment safeguards, the individual must be not only stigmatized but also

stigmatized in connection with a denial of a right or status previously recognized under state law.")(quoting *Dennis v. S & S Consolidated Rural High School District*, 577 F.2d 338, 341 (5th Cir. 1978)), *cert. denied*, 441 U.S. 905 (1979).

One case that may support Neu's position is *Little v. City of North Miami*, 805 F.2d 962 (11th Cir. 1986). *Little* involved a law professor at a state university who was publicly censured by the City Council. The Eleventh Circuit said that the law professor's allegation that the Council's defamation damaged his business reputation met the "stigma plus" requirement of *Paul v. Davis*, *supra*. *Id.* at 968-69.

Gardiner v. A.H. Robins Co., 747 F.2d 1180 (8th Cir. 1984), also supports Neu's position, but it relies on questionable authority. *Gardiner* stated that a judge's comments from the bench concerning the conduct of officers of a corporate party "constituted an infringement on the officers' liberty interests because it was a governmental attack on their good name, reputation, honor, and community standing." *Id.* at 1191. *Gardiner* supports this proposition by citing *Wisconsin v. Constantineau*, *supra*, but fails to reckon with the Supreme Court's reinterpretation of *Constantineau* in *Paul v. Davis*, *supra*.

[3] Neu was not licensed to sell insurance in New York and New York did not revoke such a license. Rather, New York prosecuted him for selling insurance without having such a license. Neu had no legally protected status entitling him to pursue his occupation in disregard of state law.

No. 88-1971

Supreme Court, U.S.
FILED
JUL 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NICHOLAS NEU,

Petitioner,

—against—

JAMES P. CORCORAN, Individually and as Superintendent of Insurance of the State of New York and JAMES W. RANDOLPH, Individually and as Deputy Superintendent of Insurance of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondents
120 Broadway
New York, New York 10271
(212) 341-2664

O. PETER SHERWOOD
Solicitor General

LAWRENCE S. KAHN
Deputy Solicitor General

FREDERIC L. LIEBERMAN
AUGUST L. FIETKAU (Counsel of Record)
Assistant Attorneys General
Of Counsel

BEST AVAILABLE COPY

Question Presented

Whether the court of appeals correctly held that it was not clearly established in 1987 that defamatory remarks by governmental officials which prevented petitioner from pursuing his occupation constituted a deprivation of liberty without due process under *Paul v. Davis*, 424 U.S. 693 (1976)?

TABLE OF CONTENTS

PAGE

Table of Authorities iii

Question Presented i

Statement of the Case 1

Reasons For Denying The Writ—

THE PETITION HAS FAILED TO MEET ANY CRITERION WHICH WOULD WARRANT THE GRANTING OF THE WRIT 4

A. The Qualified Immunity Issue 4

B. The Appealability Issue 7

Conclusion 9

TABLE OF AUTHORITIES

Cases	PAGE
Anderson v. Creighton, 483 U.S. ____, 107 S. Ct. 3034 (1987)	2, 4
Baden v. Koch, 799 F.2d 825 (2d Cir. 1986)	5
Brandt v. Board of Cooperative Educational Services, 820 F.2d 41 (2d Cir. 1987)	5
Carnegie-Mellon University v. Cohill, ____ U.S. ____, 108 S. Ct. 614, 619 (1988)	8
Davis v. Scherer, 468 U.S. 183 (1984)	8
Gentile v. Wallen, 562 F.2d 193 (2d Cir. 1977)	5
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	2, 8
Huntley v. Community School Board, 543 F.2d 979 (2d Cir. 1976) *cert. denied*, 430 U.S. 929 (1977)	5
Kearney v. Atlantic Cement Co., 33 A.D.2d 848 (3rd Dept. 1969)	7
Little v. City of North Miami, 805 F.2d 962 (11th Cir. 1986)	6
Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981)	7
Meyer v. Nebraska, 262 U.S. 390 (1923)	3
Mitchell v. Forsyth, 472 U.S. 511 (1985)	8
Paul v. Davis, 424 U.S. 693 (1976)	*passim*
Rudow v. City of New York, 822 F.2d 324 (2d Cir. 1987)	5, 7

PAGE

Statutes

28 U.S.C. § 1291 2

42 U.S.C. § 1983 ..... *passim*

Rules

Fed. R. Civ. P. 12(b)(6) 2

N.Y.C.P.L.R. § 5701(a)(2)(IV)(V) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1971

NICHOLAS NEU,

Petitioner,

—against—

JAMES P. CORCORAN, Individually and as Superintendent of Insurance of the State of New York and JAMES W. RANDOLPH, Individually and as Deputy Superintendent of Insurance of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

Between February 1985 and March 11, 1987, the plaintiff, a businessman, was the president of a New York corporation which sold pre-paid automobile collision repair contracts to the public. (A-12). In January, 1987, the New York State Supreme Court held, in a proceeding brought by the New York State Department of Insurance, that petitioner's corporation was engaged in the sale of insurance without being licensed to do so

by the Superintendent of Insurance and enjoined further sales. This injunction was affirmed on appeal. (A-12).

Petitioner claims that in June 1987, at a convention of state insurance commissioners, the Superintendent and a Deputy Superintendent made defamatory remarks concerning petitioner's operation of the New York corporation. (A-13). Petitioner then commenced this action, asserting defamation claims, pursuant to 42 U.S.C. § 1983 and state law, against the respondents. Petitioner did not claim that the alleged defamation was in connection with his termination from any government employment, since he held no such position, or with his loss of some statutory right or legal status, such as the loss of a license to sell insurance, since he was not licensed in New York. Rather, petitioner claimed consequential damages, contending that, as a result of the alleged defamation, "his reputation was ruined and he was forced out of the automobile repair business, which was his sole livelihood." (A-13).

The respondents moved to dismiss the complaint, pursuant to Rule 12(b)(6), Fed. R. Civ. P., asserting that it failed to state a claim upon which relief could be granted and that respondents were immune from liability under federal and state law. (A-13). The district court denied the motion in all respects. (A-1-A-10). The respondents appealed to the court of appeals pursuant to 28 U.S.C. § 1291 from the denial of their qualified immunity defense to the section 1983 claim. (A-13).

The court of appeals unanimously reversed the district court and directed a dismissal of the complaint on the basis of respondents' qualified immunity. Applying *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *Anderson v. Creighton*, 483 U.S. ____, 107 S. Ct. 3034 (1987), the court of appeals held that the respondents were entitled to a dismissal because it would not have been known to a reasonable person that it was "clearly established in 1987 that [respondents'] alleged actions constituted a deprivation of a protected liberty interest." (A-15). The court noted that, while this Court's decision in *Paul v. Davis*, 424 U.S. 693 (1976), held that something more than stigmatic injury flowing from defamation by governmental officials was

required in order to constitute the deprivation of a constitutionally protected liberty or property interest, it was unclear under *Paul* and its progeny in the Second Circuit in 1987, when the alleged defamation took place, what actions by governmental officers would satisfy the *Paul* "stigma-plus" test for liability under section 1983. (A-17-A-18). Specifically, it was unclear whether the "plus" could be satisfied by the deprivation of the ability to engage in any of the common occupations of life, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), or only by dismissal from a government job or deprivation of some other legal right or status. (A-18-A-19).

While noting this uncertainty, the court nevertheless stated that:

> *Paul* * * * strongly suggests that defamation, even if it leads to a significant loss of employment opportunities, is not a deprivation of a liberty interest unless it occurs in the course of dismissal or refusal to rehire * * * a government employee or during termination or alteration of some other legal right or status. Otherwise, *Paul* suggests, a defamation is merely a tort, cognizable at state law, but not a constitutional deprivation.

(A-18).

After reviewing its prior decisions (A-18-A-21), the court of appeals concluded that it did not believe "that the law of this Circuit clearly establishes that the governmental defamation alleged by Neu rises to the level of a constitutional violation, rather than simply a state law tort." (A-21-A-22) (footnote omitted). The court found that the alleged defamation "did not occur in the course of dismissal from a governmental job, nor did it come in the course of termination by New York of any legal right or status enjoyed by Neu." (A-22) (footnote omitted). Accordingly, the court held that respondents were entitled to qualified immunity with respect to Neu's federal claim. Having so ruled, the court held that it would be inappropriate to exercise jurisdiction over the pendent state claim and directed dismissal of the entire complaint. (A-22).

Reasons For Denying The Writ

THE PETITION HAS FAILED TO MEET ANY CRITERION WHICH WOULD WARRANT THE GRANTING OF THE WRIT.

The opinion below applied and is consistent with holdings of this Court and is not in conflict with any holding on the issue by any United States Court of Appeals.

A. The Qualified Immunity Issue

The court below, accepting the petitioner's allegations as true, dismissed his section 1983 liberty interest defamation claim on the basis of the respondents' qualified immunity as public officers, holding that respondents "are entitled to immunity because our prior cases have not clearly established that [respondents'] conduct deprived [petitioner] of a liberty interest protected by the due process guarantees of the Fourteenth Amendment." (A-12). The court of appeals, applying the criteria delineated in *Anderson*, 107 S. Ct. at 3039, concluded that "we do not think that the law of this Circuit clearly establishes that the governmental defamation alleged * * * rises to the level of a constitutional violation, rather than simply a state law tort." (A-21-A-22). In dismissing the action on the basis of qualified immunity, the court held that it was unnecessary to decide whether petitioner's alleged liberty interest deprivation stated a viable section 1983 claim under current law. (A-15).

The court of appeals, recognizing that under *Anderson* a qualified immunity dismissal is not warranted simply because "[t]he very action in question" has not previously been held unlawful, concluded that in light of prior decisions in the circuit, it would not have been apparent to a reasonable person in 1987 that the kind of injury of which petitioner now complains of amounted to a section 1983 liberty interest deprivation. (A-14). In analyzing prior decisions in the circuit which applied this Court's holding in *Paul v. Davis*, 424 U.S. 693 (1976), the court below noted that its prior decisions left it unclear "that defamation occurring other than in the course of dismissal" from gov-

ernment employment or the termination of "some other legal right or status" would amount to a deprivation of a constitutional liberty interest. (A-19).

The petitioner here does not contend that in the context of the alleged defamation he was terminated from government employment or that any legal status had been terminated. Rather, he claims only that the alleged defamation deprived him of the ability to pursue his business or occupation. This Court's decision in *Paul* makes clear that petitioner's claim does not rise to the level of a constitutional wrong. In discussing the prior cases which formed the basis for its holding, this Court in *Paul* stated that it is the act of "officially" removing a right or status previously recognized by the state which implicates the due process clause. 424 U.S. at 711. Thus, under *Paul*, stigma which only has a practical impact upon one's ability to practice one's profession cannot be the basis of a due process claim.

Consistent with this language in *Paul*, the decisions of the Second Circuit do not establish, much less clearly establish, that petitioner's allegations were sufficient to state a claim. (A-19-A-22/23, n.2). Thus, while the court of appeals had sustained section 1983 defamation claims which were connected with the plaintiff's termination from government employment, *Huntley v. Community School Board*, 543 F.2d 979 (2d Cir. 1978), *cert. denied*, 430 U.S. 929 (1977), and *Brandt v. Board of Cooperative Educational Services*, 820 F.2d 41 (2d Cir. 1987), it had dismissed the section 1983 claim of a school teacher who alleged the defamation occurred when she was no longer a governmental employee, *Gentile v. Wallen*, 562 F.2d 193 (2d Cir. 1977). In *Baden v. Koch*, 799 F.2d 825 (2d Cir. 1986), the court dismissed the complaint of a government employee who was only demoted in the context of an alleged defamation. In *Rudow v. City of New York*, 822 F.2d 324 (2d Cir. 1987), which was decided in the month following the alleged defamation of petitioner, the court dismissed the defamation claim of a private businessman who did not claim that he suffered a loss of public employment or that he had been barred from practicing his profession. To the extent that the opinion may have hinted that if

Rudow had alleged that the defamation deprived him of the ability to practice his profession, he might have been able to recover, the opinion was, as petitioner himself recognizes (Petition at 11), mere dictum.

None of these cases made it clear in June 1987 that a plaintiff, such as the petitioner here, who merely alleges injury flowing from an alleged defamation, not connected with a loss of government employment or termination of any pre-existing statutory or legal right, had a viable section 1983 claim.

Petitioner incorrectly contends (Petition at 8) that this case presents an issue which has divided the circuits, warranting review here. Specifically, he contends that the decisions are "in conflict" as to the circumstances under which damage to business and reputation satisfy the liberty interest "plus" element of a *Paul* defamation claim. (*Id.* at 12).

First, the court below did not decide what kind of injury would satisfy the stigma-plus test of *Paul*. Indeed, the court specifically stated that it was not deciding that issue: "Whether or not the District Court is correct that Neu adequately alleged deprivation of a liberty interest to state a claim for relief under 42 U.S.C. § 1983, [is] a matter we do not decide. . . ." (A-15). All the court below decided was that the law on the issue was unclear in the Second Circuit in 1987. Such a holding is not in conflict with any other decision of the Second Circuit or of any other circuit.

Second, if petitioner were correct in contending that the circuits are in conflict on the question of what satisfies the stigma-plus test of *Paul*, he would merely be demonstrating that even today the law remains unclear and that the court below was correct in dismissing the complaint.

Third, as the court of appeals opinion demonstrates (A-23 n.2), petitioner is in fact unable to draw support from the opinions of other circuits.[1]

---

1 The only direct authority petitioner cites for the alleged conflict in the circuits is *Little v. City of North Miami*, 805 F.2d 962 (11th Cir.

B. The Appealability Issue.

Petitioner contends that a second issue warranting review arises from the court of appeals' exercise of jurisdiction over the appeal. He claims that the court of appeals should have dismissed the appeal because respondents will in any event be subject to trial in state court under state tort law. He argues (Petition at 15-18) that the theory behind collateral order appeals on the issue of section 1983 qualified immunity—to shield public officers from baseless litigation and from personal monetary liability where they could not reasonably have known that their conduct was unconstitutional—is inapplicable where those public officers are still subject to suit in state court. Petitioner's argument is without merit.

First, there is no assurance that respondents will have to face a state court trial following dismissal of the federal action. If a new action is commenced in state court, the trial judge may not adhere to the district court's ruling rejecting respondent's state law immunity defense, and if he does, the ruling would be appealable as of right. N.Y.C.P.L.R. § 5701(a)(2)(iv),(v); *Kearney v. Atlantic Cement Co.*, 33 A.D.2d 848 (3d Dept. 1969).

Second, even if respondents would have to face a state court trial, they still should be afforded an immediate appeal of the order rejecting their qualified immunity defense. As petitioner

---

1986). In that case, the court, relying on *Marrero v. City of Hialeah*, 625 F.2d 499 (5th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981), and other eleventh circuit cases, upheld the section 1983 claim of a law professor involving defamation unconnected to government employment. The court there held that a claim of damage to the goodwill of one's business met the stigma-plus test of *Paul*. However, under Florida law a businessman possessed a *statutory* right to his reputation and good will. *Rudow*, 822 F.2d at 330 (distinguishing *Marrero* as a case where the stigma-plus test of *Paul* was met because the plaintiff had an "affirmative property right to business goodwill created by Florida statute"); *see Paul*, 424 U.S. at 711-12. Thus, in Florida such a defamation meets the stigma-plus test because it results in a deprivation of a statutory right or status. Petitioner claims no similar statutory right in New York.

recognizes (Petition at 15), this Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), permitting interlocutory appeals from orders rejecting a qualified immunity defense, protects state officials from the substantial distractions presented by a lawsuit. *See id.* at 526. Denying an appeal simply because the defendant might yet face a state trial would severely undermine *Mitchell* by creating the possibility that the defendant might have to face lengthy federal *and* state litigation instead of just a state trial. This would occur where, after a district court rejects a qualified immunity defense, subjecting a defendant to extensive discovery, the court dismisses the federal claim on a summary judgment motion and simultaneously dismisses the pendent state claim. *See Carnegie-Mellon University v. Cohill*, ____ U.S. ____, 108 S. Ct. 614, 619 (1988) (dismissal of pendent state claims is generally appropriate when the federal claims are dismissed before trial). If the plaintiff then commenced state court litigation, the governmental official would be compelled to defend himself a second time against the same basic claim. The prospect of such duplicative litigation,[2] with its attendant infringement upon a government official's ability to discharge his official duties, is avoided by permitting the official to take an immediate appeal from the denial of his qualified immunity defense.

Petitioner's argument, if accepted, would defeat a collateral appeal under *Mitchell* whenever a plaintiff pends a state claim to his Section 1983 claim.[3] Petitioner has failed to demonstrate the wisdom of such an approach or to cite to any decision which supports his position. The issue does not warrant review.

---

2 This Court has held that "even such pretrial matters as discovery are to be avoided if possible, as [i]nquiries of this kind can be peculiarly disruptive of effective government." *Mitchell*, 472 U.S. at 526 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982)).

3 Contrary to petitioner's suggestion (Petition at 17), this Court has held that a showing that conduct is unlawful under state law does not defeat a qualified immunity defense to a section 1983 claim. *Davis v. Scherer*, 468 U.S. 183 (1984).

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
July 3, 1989

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondents
120 Broadway
New York, New York 10271
(212) 341-2664

O. PETER SHERWOOD
Solicitor General

LAWRENCE S. KAHN
Deputy Solicitor General

FREDERIC L. LIEBERMAN
AUGUST L. FIETKAU (Counsel of Record)
Assistant Attorneys General
Of Counsel